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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

No. 80-5672

ROGER COLLINS,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

REPLY TO OPPOSITION

MARSHALL W. KRAUSE,
KRAUSE, TIMAN, BASKIN, SHELL & GRANT
Wood Island, Suite 207
60 E. Sir Francis Drake Blvd.
Larkspur, CA 94939
Telephone: (415) 461-4100

Attorneys for Petitioner.

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I

THE CHALLENGED JURY INSTRUCTION MUST FALL UNDER SANDSTROM v. MONTANA

Many of the grounds upon which respondent urges this Court to distinguish Sandstrom v. Montana (1979) 442 U.S. 510, from petitioner's case have already been examined in the Sandstrom opinion. Respondent argues that instructions on the presumption of innocence and the burden of proof of the prosecution discharge the constitutional error created when the jury was instructed that it could presume criminal intent from the acts of the defendant. (R.T. 327-328.) But this Court has already handled this problem in footnote 7 of the Sandstrom opinion:

> The jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied. For example, if the presumption were viewed as conclusive, the jury could have believed that although intent must be proven beyond a reasonable doubt, proof of the voluntary slaying and its ordinary consequences constituted proof of intent beyond a reasonable doubt.

This court pointed out in Sandstrom that the common definition of "presume" as found in Webster's New Collegiate Dictionary (1974) is "to suppose to be true without proof." Perhaps even more damning to the respondent's argument is the definition of presumption given by the trial court to this jury:

> A presumption is a conclusion which the law draws from given facts. (R.T. 327.)

A "conclusion" is of course the final result or decision, a term of great consequence to a jury.

This Court in Sandstrom was very clear that allowing a jury to presume a vital element of the prosecution's case as a legal conclusion from other facts which were not rebutted is, and has historically been, to deprive a defendant of his constitutional right to require the government to prove its case beyond a reasonable doubt. The court stated at 61 L.Ed. 45:

> Sandstrom's jurors were told that "that law presumes that a person intends the ordinary consequences of his voluntary acts." They were not told that they had a choice, or that they might infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory. [Citing cases]

This same thought was put in another way by this Court in Sandstrom at 61 L.Ed.2d 50:

> Upon finding proof of one element of the crime (causing death), and of facts sufficient to establish the second (the voluntariness and "ordinary consequences" of defendant's action), Sandstrom's jurors could reasonbly have concluded that they were directed to find against defendant on the element of intent. The State was thus not forced to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged," 397 U.S. at 364, and defendant was deprived of his constitutional rights as explicated in Winship.

Strangely, respondent insists that "the jury was instructed in unambiguous terms that the criminal intent may not be presumed." (Respondent's Brief, p. 5.) Yet on page 3 of respondent's brief the trial court's instruction on criminal intent is quoted:

> It [criminal intent] may be demonstrated by the acts and conduct of the defendant, it may be inferred from the proven circumstances or it may be presumed where it appears to be the necessary or probable consequence of the defendant's acts. [R.T. 328, emphasis added.]

This instruction is a repetition of the error at R.T. 327 presuming a person of sound mind and discretion to intend the natural and probable consequences of his acts and was in no way qualified by the trial judge. The fact that there were other instructions which the jury might have followed to obtain a correct view of the law is of no moment, as Sandstrom holds. (61 L.Ed.2d at 51.) The end result of the two instructions challenged here is that the jury, at best, received contradictory instructions on the State's burden to prove intent beyond a reasonable doubt.

II

THE GEORGIA SUPREME COURT FAILED TO EXAMINE THE ISSUE OF WHETHER THE JURY RECEIVED AN APPROPRIATELY NARROWING CONSTRUCTION OF AGGRAVATING CIRCUMSTANCE (7)

Contrary to respondent's argument, petitioner does not claim that this Court's decision in Godfrey v. Georgia (1980) 446 U.S.____, required the Supreme Court of Georgia to remand for a new jury sentencing. Petitioner's position is that the Georgia Supreme Court failed to examine the question of whether the jury was properly instructed on the sentencing issue, and that this re-examination was a part of the mandate of this Court when this case was previously remanded. Petitioner is constitutionally entitled to a properly instructed jury on the

issue of penalty even if the Georgia Supreme Court has appropriately fulfilled its responsibility in reviewing the issue of whether the penalty is valid. It is the jury which has the initial discretion in the matter and that jury must be instructed in a constitutionally authorized manner. Although, there may be no constitutional right to jury sentencing, Georgia procedure provides for such sentencing and it therefore must follow constitutional guidelines.

Respondent does not comment on the fact that the Georgia Supreme Court had earlier stated, in Gates v. State (1979) 244 Ga. 587, 261 S.E.2d 349, 357:

> "This defendant's jury was not charged on the meaning of this aggravating circumstance [(b)(7)] as it was intended by the legislature and has been interpreted by this Court."

III

SECTION (b)(7) DOES NOT SATISFY THE REQUIREMENTS OF DUE PROCESS OF LAW

Respondent takes the same position now as the Georgia Supreme Court took when this case was last remanded to it. That is, as long as some factual distinctions may be found between this case and Godfrey, § (b)(7) can be constitutionally applied to petitioner. Neither the Georgia Supreme Court nor respondent wrestled with the difficult definitional problems created by the vague and broad words of § (b)(7). Most, if not all, murders are unique and have horrifying aspects. There must be a concrete means of distinguishing cases which fall within § (b)(7) and those which fall without it, although both involve first degree murder. Neither the Georgia Supreme nor respondent has made an attempt in this direction.

IV

THE DEATH PENALTY CANNOT BE UPHELD ON THE ALTERNATIVE GROUND OF AGGRAVATING CIRCUMSTANCE (2)

Respondent argues that Gregg v. Georgia (1976) 428 U.S. 153 defeats petitioner's argument on this point. The effect of the infirmity of one of several grounds for imposition of the death penalty was not specifically decided in Gregg. Petitioner does not know whether this point was even argued in Gregg. However, Gregg has as its main concern whether or not the death penalty is always a violation of the Eighth Amendment's prohibition of cruel or unusual punishments and whether the Georgia procedural scheme is adequate to meet constitutional standards. Neither of these points meets petitioner's argument.

It is true that in Westbrook v. Balkcom (1980) U.S. ___ (Nos. 79-6615 and 79-6704) Justice Stevens filed a special concurring opinion to the denial of certiorari which would allow the Georgia Supreme Court to sustain a death sentence if any of the aggravating circumstances were free of constitutional infirmity. Petitioner believes that the Court has not yet spoken on this issue and that it is an important one deserving full briefing and argument before decision for the reason mentioned on pages 21 through 24 of the Petition for Writ of Certiorari.

Respondent has no comment on petitioner's argument that the same crime, rape, cannot serve as the basis for the imposition of the felony-murder rule and as an aggravating circumstance, as held by the Supreme Court of North Carolina in State v. Cherry (1979) ____ N.C. ____ 257 S.E.2d 551, 567, 568.

V

PETITIONER'S SENTENCE IS ARBITRARILY DISPROPORTIONATE TO THAT OF HIS CO-DEFENDANT

The arbitrary discrimination petitioner complains of is not the decision of the jury in either his case or Durham's case. It is the arbitrariness of the Georgia Supreme Court in failing to reduce his sentence in the light of the sentence given to his co-defendant. Of course, the Georgia Supreme Court was fully cognizant of both sentences and discussed the facts of both in its opinion. Its decision only became arbitrary when it refused to make the sentences rational.

What the Georgia Supreme Court did is merely point out facts which tend to show the petitioner was not a bystander but was an active participant in the crime. However, it failed to compare these facts with the participation of Durham. Obviously, some comparison has to be made under this Court's decision in Gregg v. Georgia (1976) 428 U.S. 153 if the anticipated even-handed application of the Georgia statute is to be a reality. It was the duty of the Georgia Supreme Court not to decide whether petitioner was fully culpable but to decide whether he was so much more culpable than his co-defendant as to justify a death sentence in the face of the sparing of the life of his co-defendant. This duty was performed by the Georgia Supreme Court in Hall v. The State (1978) 241 Ga. 252, 244 S.E.2d 833, but ignored in petitioner's case.

VI

PETITIONER RECEIVED CONSTITUTIONALLY DEFICIENT ASSISTANCE OF COUNSEL BOTH AT HIS TRIAL AND ON HIS APPEAL TO THE GEORGIA SUPREME COURT

Respondent contents itself on this point by stating that it was not raised before the Georgia Supreme Court. When the Georgia Supreme Court engages in the practice, as it did in this case, of allowing appointed trial counsel to be appointed appellate counsel, we can hardly expect that appellate counsel

will be very critical of trial counsel. Evidently, respondent would have this Court accept the argument that the more inadequate counsel is on appeal, the more insulated from constitutional review will be the inadequacy of trial counsel.

Respondent nowhere denies that facts of great moment concerning petitioner and his defense were either kept from the jury entirely or presented to the jury at the most awkward and insulting time so as to contradict and mock this Court's holding in Woodson v. North Carolina (1976) 428 U.S. 280, 304 and Lockett v. Ohio, ___ U.S. ___, 57 L.Ed.2d 973, 987 that a jury considering the death sentence must have an adequate picture of the defendant's character, background and motivation. Only defense counsel can be expected to perform this task. Petitioner's defense counsel deprived petitioner of his chance to not be the victim of an arbitrary death penalty decision. Now we ask that this Court make it clear to the nation that counsel in death penalty cases must actively seek and present to the jury the mitigating factors in their clients' backgrounds.

VII

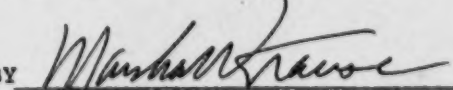
CONCLUSION

For the reasons stated this court should review the conviction and death penalty sentence of Roger Collins by issuing it writ of certiorari to the Supreme Court of Georgia.

DATED: December 23, 1980

Respectfully submitted,

KRAUSE, TIMAN, BASKIN, SHELL & GRANT

BY 

MARSHALL W. KRAUSE
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 1980, a copy of this Reply to Opposition was mailed, postage prepaid, to:

Daryl A. Robinson
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, GA 30334

